

### § 2638.303

of the person. Notwithstanding this direct involvement requirement, a designated agency ethics official may always request an opinion concerning a situation about which he or she has knowledge.

#### § 2638.303 Subject matter of formal advisory opinions.

Formal advisory opinions will be rendered on matters of general applicability or on important matters of first impression concerning the application of the Act, Executive Order 11222 and regulations promulgated pursuant to such Act and Executive Order, and the laws embodied in 18 U.S.C. 202-209. The Director will respond to those requests which in his or her discretion fall within this category taking into consideration:

- (a) The unique nature of the question and its precedential value,
- (b) The potential number of officers or employees throughout the Government affected by the question,
- (c) The frequency with which the question arises, and
- (d) The likelihood or presence of inconsistent interpretations on the same question by different agencies.

Except in unusual circumstances, opinions will not be rendered with respect to hypothetical situations posed in requests. Opinions may be rendered, however, on proposed activities or transactions.

#### § 2638.304 Form of requests for formal advisory opinions.

(a) A request for a formal advisory opinion should be directed to the Director of the Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005-3917.

(b)(1) A request should be in writing and signed by the individual making the request or by a representative of that person. A request shall state all material facts necessary for the Director to render a complete and correct opinion.

(2) In addition, it should also include the following information:

- (i) the name, mailing address, and daytime telephone contact of the individual making the request, and
- (ii) a copy of the position, description of the position involved, if available.

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(c) If the request is submitted by a representative, he or she must show his or her representative status, list a mailing address and daytime telephone contact.

[46 FR 2583, Jan. 9, 1981. Redesignated at 54 FR 50231, Dec. 5, 1989, and amended at 55 FR 27180, July 2, 1990]

#### § 2638.305 Acceptance of requests for formal advisory opinions.

(a) Subject to the provisions of paragraph (d) of this section, the Director shall review each request for a formal advisory opinion and take one of the following actions:

(1) If the Director determines that the person making the request meets the requirements of § 2638.302 and that the subject matter of the request qualifies under the criteria established in § 2638.303, he or she shall assign an identifying number to the request and notify the person that a formal advisory opinion will be rendered; or

(2) If the Director determines that the person making the request is not a person who is eligible to receive a formal advisory opinion as provided in § 2638.302, or that the subject of the request is not a matter upon which the Office issues formal advisory opinions as outlined by § 2638.303, he or she shall so notify the person making the request.

When a formal advisory opinion will not be rendered, the Office of Government Ethics may provide other informational assistance to the person as appropriate. (See also § 2638.312.)

(b) If at any time after receipt of a request for a formal advisory opinion, the Director believes that additional relevant information is needed, he or she may seek such information directly from the person requesting the opinion or from other sources which may include the agency involved.

(c) The person requesting the opinion may furnish the Office of Government Ethics with legal memoranda or other material relevant to the opinion requested.

(d)(1) In the case of a request which involves an actual or apparent violation of any conflict of interest law embodied in 18 U.S.C. 202-209, the Director shall consult with the Criminal Division of the Department of Justice.

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(2) If after such consultation the Criminal Division determines that a criminal investigation will be undertaken, the Director shall take no further action with regard to that request pending a determination by the Criminal Division not to prosecute.

(3) Upon receipt of a determination by the Criminal Division not to prosecute, the Director shall then follow the procedures for all other requests for formal advisory opinions set forth in this part.

### § 2638.306 Notice of requests.

The Director shall provide notice to interested parties identified in a request which will be the subject of a formal advisory opinion that such an opinion will be rendered. Generally, the designated agency ethics official of the agency involved shall be notified of the request.

### § 2638.307 Written comment on requests.

(a) To the extent practicable, the Director shall provide interested parties with an opportunity to submit written comment on a request for a formal advisory opinion. A time by which the comment should be received to be considered will be indicated with the notice that the request has been made.

(b) Additional time in which to comment may be granted upon written request to or at the discretion of the Director. Such requests and all written comments shall be sent to the Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005-3917.

[46 FR 2583, Jan. 9, 1981. Redesignated at 54 FR 50231, Dec. 5, 1989, and amended at 55 FR 27180, July 2, 1990]

### § 2638.308 Issuance.

(a) A formal advisory opinion,

(1) Which involves the application of any conflict of interest law embodied in 18 U.S.C. 202-209 to a transaction or activity which does not raise a question of an actual or apparent violation of this law but which raises an important matter of first impression, or

(2) Which is issued following the procedure set forth in § 2638.305(d),

requires consultation by the Office of Government Ethics with the Office of Legal Counsel of the Department of Justice before it is issued.

(b) An advisory opinion shall be considered issued when it is dated, numbered, and signed by the Director. Unless released by the person who made the request, the opinion will not become publicly available until information which identifies individuals involved and which is unnecessary to the complete understanding of the opinion has been deleted from the opinion and this version of the opinion is placed in a public reading file at the Office of Government Ethics. (See § 2638.310)

### § 2638.309 Reliance on formal advisory opinions.

(a) Any formal advisory opinion referred to in § 2638.308(a) or any provisions or finding of a formal advisory opinion involving the application of the Act, Executive Order 11222 and the regulations promulgated pursuant to the Act or Executive Order, may be relied upon by:

(1) Any person directly involved in the specific transaction or activity with respect to which such advisory opinion has been rendered, and

(2) Any person directly involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion was rendered.

(b) Any person who relies upon any provision or finding of any formal advisory opinion in accordance with paragraph (a) of this section and who acts in good faith in accordance with the provisions and findings of such opinion, shall not, as a result of such act, be subject to prosecution under 18 U.S.C. 202-209 or, in the case where the opinion is exculpatory, be subject to any administrative adverse action or civil action based upon legal authority cited in that opinion.

### § 2638.310 Public availability and publication of formal advisory opinions.

(a) The Director shall make sufficient deletions in any formal advisory opinion so that unless necessary to the complete understanding of the opinion,